Tan Ching Choong & Ors v Ekabina Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL NO S3–22–582 OF 2000
ARIFIN ZAKARIA J
1 APRIL 2002

Civil Procedure *— Parties — Locus standi — Assignment of rights, title and interest under sale and purchase agreement by plaintiffs to financial institutions — Whether plaintiffs had locus standi to maintain action against defendants in view of assignment to financial institutions — Whether assignment was absolute — Principles in determining whether an assignment was absolute or otherwise — Civil Law Act 1956 s 4(3)*

Contract *— Assignment — Absolute assignment — Assignment of rights, title and interest under sale and purchase agreement by plaintiffs to financial institutions — Whether plaintiffs had locus standi to maintain action against defendants in view of assignment to financial institutions — Whether assignment was absolute — Principles in determining whether an assignment was absolute or otherwise — Civil Law Act 1956 s 4(3)*

The plaintiffs were the purchasers of various parcels in the buildings to be constructed by the first defendant on the second defendant's land. To finance the purchase of the parcels, the plaintiffs entered into a loan agreement cum assignment ('LACA') with the respective financial institution. The LACA provided that 'in consideration of the lender having granted to the to the assignor the said loan, the assignor as the beneficial owner of the said property hereby assigns absolutely to the lender all his rights, title and interest in and to the said property and under the sale and purchase agreement ...'. The first and second defendants ('the defendants') had committed several breaches under the sale and purchase agreements and as a result thereof the plaintiffs commenced proceedings against them. This was an application by the defendants for a preliminary issue to be tried before the trial of this action and this issue was whether the plaintiffs had locus standi to commence this action. The defendants contended that this issue ought to be disposed of prior to the trial because in the event that the court were to answer the issue in the negative, the plaintiffs' action herein would be dismissed.

Held, allowing the defendants' application:

(1) The question posed by the defendants, if decided in their favour, would bring an end to this suit. This would save costs and time, which would otherwise be expanded to deal with other issues of the case. On this premise, the defendants' application was allowed (see p 658A–B).

(2) The Federal Court in *Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd* [1984] 2 MLJ 268 had formulated principles in determining whether an assignment was an absolute assignment or otherwise. The principles were: (a) whether or not an assignment was an absolute assignment (and not by way of

charge only) within the meaning of s 4(3) of the Civil Law Act 1956 was to be gathered from the four corners of the deed of assignment itself; (b) a deed of assignment was intended to be an absolute assignment because of the use of the word 'absolutely' in the deed; and (c) if the assignment was an absolute assignment, the plaintiffs were not competent to maintain the action at the time the suit was filed (see p 659D–E).

(3) The court was bound by the views as expressed in *Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd* and after having given careful consideration to the terms of the assignment as found in the LACA, they were in the nature of an absolute assignment. Hence, the plaintiffs did not have any locus standi to institute the present proceedings against the defendants. Accordingly, the plaintiffs' claims herein was dismissed pursuant to O 14 r 1(2) and/or O 33 r 5 of the Rules of the High Court 1980 (see p 661A–C); *Max-Benefit Sdn Bhd v Phuah Thean An & Anor* [2001] 1 MLJ 553 not followed.

[Bahasa Malaysia summary

Plaintif-plaintif adalah pembeli-pembeli pelbagai unit dalam bangunan tersebut yang harus dibina oleh defendan pertama di atas tanah defendan kedua. Untuk membiayai pembelian unit-unit tersebut, plaintif-plaintif telah memasuki perjanjian pinjaman dan penyerahhakan ('LACA') dengan institusi kewangan masing-masing. LACA tersebut memperuntukkan bahawa 'sebagai balasan pemberi pinjaman memberikan pinjaman kepada penyerahhak tersebut, penyerahhak tersebut sebagai tuanpunya benefisial hartanah tersebut dengan ini menyerahhak secara mutlak kepada pemberi pinjaman semua hak, hakmilik dan kepentingan beliau di dalam dan kepada hartanah tersebut dan di bawah perjanjian jual beli ...'. Defendan-defendan pertama dan kedua ('defendan-defendan tersebut') telah melakukan beberapa keingkaran di bawah perjanjian-perjanjian jual beli dan akibatnya plaintif-plaintif telah memulakan prosiding terhadap beliau. Ini merupakan satu permohonan oleh defendan-defendan untuk satu isu awalan dibicarakan sebelum perbicaraan tindakan ini dan isu ini adalah sama ada plaintif-plaintif mempunyai locus standi untuk memulakan tindakan ini. Defendan-defendan menegaskan bahawa isu ini haruslah dilupuskan sebelum perbicaraan kerana sekiranya mahkamah menjawab isu itu dengan menidakkannya, tindakan plaintif-plaintif di sini akan ditolak.

Diputuskan, membenarkan permohonan defendan-defendan:

(1) Persoalan yang dikemukakan oleh defendan-defendan, jika diputuskan memihak kepada mereka, akan menamatkan guaman ini. Ini akan menjimatkan masa dan kos yang mana akan sebaliknya dibelanjakan untuk menguruskan isu-isu lain kes

tersebut. Atas keadaan ini, permohonan defendan-defendan telah dibenarkan (lihat ms 658A–B).

(2) Mahkamah Persekutuan di dalam *Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd* [1984] 2 MLJ 268 telah merumuskan prinsip bagi menentukan sama ada sesuatu penyerahhakan merupakan suatu penyerahhakan mutlak atau sebaliknya. Prinsip-prinsipnya adalah: (a) sama ada sesuatu penyerahhakan adalah mutlak atau pun tidak (dan bukan melalui gadaian sahaja) di dalam lingkungan maksud s 4(3) Akta Undang-Undang Sivil 1956 haruslah dirumuskan daripada keseluruhan suratikatan penyerahhakan itu sendiri; (b) sesuatu suratikatan penyerahhakan diniatkan supaya menjadi suatu penyerahhakan mutlak kerana penggunaan perkataan 'secara mutlaknya' dalam suratikatan tersebut; dan (c) jika penyerahhakan itu merupakan penyerahhakan yang mutlak, plaintif-plaintif tidak kompeten untuk mengekalkan tindakan tersebut pada waktu guaman tersebut difailkan (lihat ms 659D–E).

(3) Mahkamah terikat oleh pandangan seperti mana yang dinyatakan di dalam *Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd* dan selepas menimbangkan dengan penuh ketelitian terma-terma penyerahhakan tersebut seperti mana yang terdapat di dalam LACA, mahkamah mendapati terma-terma tersebut adalah bersifat penyerahhakan mutlak. Oleh itu plaintif-plaintif tidak mempunyai locus standi untuk memulakan prosiding semasa ini terhadap defendan-defendan. Sehubungan itu, tuntutan plaintif-plaintif di sini telah ditolak selaras dengan A 14 k 1(2) dan/atau A 33 k 5 Kaedah-Kaedah Mahkamah Tinggi 1980 (lihat ms 661A–C); *Max-Benefit Sdn Bhd v Phuah Thean An & Anor* [2001] 1 MLJ 553 tidak diikut.]

Notes

For cases on locus standi, see 2(3) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 4276–4285.

For cases on absolute assignment, see 3(2) *Mallal's Digest* (4th Ed, 2000 Reissue) paras 1895–1900.

Cases referred to

Bank of Tokyo Ltd v Mohd Zaini bin Arshad [1991] 3 MLJ 50 (refd)

Christina Angelina a/p William Bastian & Anor v Newacres Sdn Bhd [1996] 5 MLJ 549 (refd)

Kredin Sdn Bhd v YTF Investments Sdn Bhd [1998] 1 MLJ 46 (refd)

Max-Benefit Sdn Bhd v Phuah Thean An & Anor [2001] 1 MLJ 553 (not folld)

Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd [1984] 2 MLJ 268 (folld)

Thanaraj a/l Manikam & Ors v Lower Perak Tamil Co-operative Society [1997] 4 MLJ 82 (refd)

Legislation referred to

Civil Law Act 1956 s 4(3)
Rules of the High Court 1980 O 14A r 1(2), O 33 r 2,5

Harpal Singh (*Harwinder Kaur* and *Jasvinjit Singh* with him) (*AJ Ariffin, Yeo & Harpal*) for the plaintiffs.

Dennis Appaduray (*Wong Rhen Yen* with him) (*Dennis Nik & Wong*) for the first and second defendants.

Philip Chye (*Soo Thien Ming & Nashrah*) for the third defendant.

Arifin Zakaria J: This is an application by first and second defendants for a preliminary question or issue to be tried before the trial of this action pursuant to O 14A or O 33 r 2 of the Rules of the High Court 1980 ('the RHC'). The question or issue, as formulated by them, is whether the plaintiffs (other than the 13th, 14th and 15th plaintiffs) have the locus standi to commence this action based on the facts as evidenced by the pleadings before the court. The 13th 14th and 15th plaintiffs are not involved in this application because the bank (15th plaintiff) is already joined as a party to this action. The first and second defendants contended that this question or issue ought to be disposed of prior to the trial of this action on the ground that in the event the court was to answer the question or issue in the negative, then the plaintiffs' action herein ought to be dismissed.

The facts leading to this action which are relevant to this application may briefly be stated as follows. The plaintiffs are the purchasers of various parcels in the buildings to be constructed by the first defendant on the land belonging to the second defendant. To finance the purchase of the said parcels, each of the plaintiffs had entered into a loan cum assignment agreement with the respective financial institution in which the plaintiffs assigned all their rights and interest under the sale and purchase agreement ('SPA') to the respective financial institution. This fact is pleaded in para 3 of the amended statement of claim. The plaintiffs in their claim further alleged that the first and second defendants had committed several breaches of the SPA, and on that premise, the plaintiffs pray, inter alia, that the SPA be declared null and void.

The guiding principles to be followed in dealing with an application such as this is clearly stated by Kang Hwee Gee J in *Thanaraj a/l Manikam & Ors v Lower Perak Tamil Co-operative Society* [1997] 4 MLJ 82 at p 88 where he said:

> Ideally, the procedure for the defendant to adopt was to plead the issue in their statement of defence under O 18 r 11 of the RHC. He could then follow up by an application under O 33 r 2, and if it appears to the court that the decision on the preliminary issue substantially disposes of the cause or matter or renders the trial of the cause or matter unnecessary, the court may then act under O 33 r 5 to dismiss the plaintiffs' action (see Supreme Court Practice 1985 para 18/11/1 at p 276). Under O 33 r 2 however, the defendant need not plead the issue of law in his statement of defence and a format application need not be made.
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> It is clear to me, firstly, that the issue of law raised in this instance would not require the ascertainment of any facts beyond those that appear in the

pleadings, and secondly, that a decision on the issue, if favourable to the defence, would render the trial unnecessary which could only lead to much savings and costs. I therefore fail to see why the defendant should not be allowed to proceed with their application.

Similarly, I find that the question posed by the first and second defendants, if decided in their favour, would bring an end to this suit. This certainly would save costs and time which would otherwise be expended to deal will other issues in the case. On that premise, I therefore allowed the first and second defendants to proceed with their application.

The material issue before me is what the nature of the various assignments found in the present case is, is it an absolute or non-absolute assignment? The applicable test is found in the leading case of *Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn Bhd* [1984] 2 MLJ 268. There, the Federal Court at pp 270–271 stated what is now considered as the guiding test on this question, which read as follows:

> In our judgement, and it seems clear from the authorities above-mentioned, whether or not an assignment is an absolute one (not purporting to be by way of charge only) within the meaning of s 4(3) of the Civil Law Act 1956 is to be gathered only from the four corners of the instrument itself.
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> Now, the assignment of 18 February 1978 appears to be in the form of a legal document signed by all the parties concerned, viz assignor (appellant), assignee (Public Bank) and the predecessor-in-title of the respondent. After reciting that: (a) the appellant had entered into a sale agreement with the respondent's predecessor-in-title for the purchase of one unit of shop/office lot in the Merlin Tower; (b) that Public Bank would give a loan to the appellant to enable him to pay off the balance of the purchase price; (c) that when the 'strata title' of the said property was issued and registered in the name of the appellant, he would execute and register a first charge of the said property in favour of Public Bank; and (d) pending the issue of the 'strata title', the appellant would assign to Public Bank all his rights, title and interest in the said property and the appellant duly executed the assignment in the following terms:
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> > 'That in consideration of the Bank having agreed to grant the loan the assignor, as beneficial owner, hereby assigns absolutely to the Bank all his rights, title and interest in and to the said property and under the said sale agreement and the full benefit granted thereby and all stipulations therein contained and all remedies for enforcing the same (see cl 1).'
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> Clause 2 provides, inter alia, that the assignor shall at all times hereinafter save harmless and keep the Bank indemnified. The assignor shall be solely liable for the cost of preparing the document of assignment (see cl 3), and the assignment shall be binding upon the executors, administrators or assigns of the parties (see cl 4). In cl 5, it reads:
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> > 'This assignment shall remain in force until such time as it shall be revoked by the execution and registration thereof by the assignor of a first legal charge over the said land in favour of the Bank.'
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> Looking at the whole document of 18 February 1978, and bearing in mind the provision of s 6 of the Act, in our opinion, the document was an absolute assignment and not purporting to be by way of charge only within the meaning of s 4(3) of the Civil Law Act 1956. The assignment was in terms absolute in

A the sense that the assignor (appellant) intended to pass and transfer to the assignee (Public Bank) absolutely the beneficial interest as well as all the rights, title and interest in the sale agreement dated 1 April 1977 and the remedies of enforcing them. The instrument clearly purported and was intended in point of form, to be an absolute assignment because of the use of the word 'absolutely' in cl 1 thereof (see Fry LJ in *Confort v Betts* [1891] 1 QB B 737 at p 740). If the assignment was an absolute one (not purporting to be by way of charge only) the fact that it had the effect of passing to the assignee the rights, title and interest of the assignor in the sale agreement and the beneficial interest of the assignor in the said property under the said sale agreement by way of security only, did not derogate from the absolute character of that assignment (*Hughes v Pump House Hotel Co Ltd* [1902] KB 190 and *Comfort v Betts*). We therefore agree with the jugdment of the learned judicial C commissioner but for different reason, that the appellant was not competent to maintain this action at the time when the originating summons was filed on 17 November 1982. The appeal is dismissed with costs to the respondent. The deposit of $500 to bepaid to the respondent on account of taxed costs.

The learned counsel for the first and second defendants submitted, and D I agree with him on this, that the Federal Court in *Nouvau* had formulated the following principles as a guide in considering this question, namely:

(a) whether or not an assignment is an absolute assignment (not purportedly to be by way of charge only) within the meaning s 4(3) of the Civil Law Act 1956 is to be gathered only from the four corners of E the instrument itself, ie the deed of assignment only;

(b) a deed of assignment was intended to be an absolute assignment because of the use of word 'absolutely' in the deed;

(c) if the assignment is absolute, the plaintiffs are not competent to maintain the action at the time the suit was filed.

F The terms of the respective deed of assignment in the present case are found in exh 'CSC-2' in encl 13.

Essentially, what the deed of assignment provides is that pending the issue of the 'strata titles', the plaintiffs assign to the financial institution all their rights and interest in the said parcels. The terms of assignment as G contained in the deed of assignment between the first and second plaintiffs and Public Finance Bhd read as follows:

> In consideration of the lender having granted to the assignor the said loan the assignor, as beneficial owner of the said property, hereby assigns absolutely to the lender all his rights, title and interest in and to the said property and under H the sale and purchase agreement and the full benefit and advantage thereof and of all stipulations and obligations and liabilities therein contained, and all remedies for enforcing the same TO HOLD the same unto the lender for all the interests of the assignor therein absolutely and the Assignor shall at all times hereinafter, save harmless, and keep the lender indemnified against all actions, proceedings, damages, penalties, costs, claims, demands and expenses which maybe brought or made against or incurred by the lender by I reason or on account of the non-observance of all or any of the stipulations on the part of the assignor contained in the sale and purchase agreement which the assignor should have performed prior to the date of the agreement.

Similar terms of assignment are found in the deeds of assignment entered into by the other plaintiffs. The learned counsel for the plaintiffs contended that the real intention of the parties is to merely create a charge over the said parcel and not an absolute assignment. He said the assignment was made simply because of the absence of an issue document of title in respect of the said parcel. The learned counsel relied on the view expressed by KC Vohrah J in *Max-Benefit Sdn Bhd v Phuah Thean An & Anor* [2001] 1 MLJ 553 in support of his contention. At p 556, the learned judge stated:

> Although the assignment is stated to be absolute, in effect it is not. The assignment was purely for the purpose of securing the loan. What I have adverted to shows that there was a loan which the assignors-purchasers had taken from the bank and that the loan had to be repaid over a period of time and that the rights and interests over the property were assigned as surety to ensure that the loan will be repaid. The loan or any balance or part of it was given 'upon the security of the same properly'.
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> The implication is that the assignment of the equitable chose in action would come to an end, it would revert back to the assignors on one of the two events taking place, whichever comes earlier. The first event is where the loan is fully repaid. The second event is where the developer has obtained the legal title to the property and the property is then transferred to the assignors-purchasers with the consent of the assignee bank.
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> Thus, it is quite obvious that the assignment of the equitable estate in the property was conditional and was merely to secure the loan and was not an absolute assignment (see *Durham Brothers v Robertson* [1898] 1 QD 765). The assignment to the bank was by way of charge only.

Against that, we have the following cases which go contrary to the view expressed by KC Vohrah J, namely: *Kredin Sdn Bhd v YTF Investments Sdn Bhd* [1998] 1 MLJ 46 (Court of Appeal); *Bank of Tokyo Ltd v Mohd Zaini bin Arshad (Maria Pragasam, Intervenor)* [1991] 3 MLJ 50 and *Christina Angelina a/p William Bastian & Anor v Newacres Sdn Bhd* [1996] 5 MLJ 549.

In this regard, I need only refer to what was said by Shaik Daud JCA in *Kredin Sdn Bhd* at p 55 which reads:

> Mr Royan, for YTF, finally raises another issue which merits consideration, the questions as to whether Kredin is entitled in the first place, to bring this action in its own name. He queried that since Kredin contends that the assignment was absolute and this is borne out by cl 1 of the deed of assignment, can Kredin, then, bring this action? Under the assignment, Kredin has assigned all its rights, title and interest in the lands and the sale and purchase agreement and all remedies for enforcing the same. Accordingly, he argued that, if there is merit in Kredin's contention (which he denied), only the bank would be entitled to commence any action in relation to the sale and purchase agreement against YTF.
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> Based on the Federal Court's decision in *Nouvau Mont Dor (M) Sdn Bhd v Faber Development Sdn* [1984] 2 MLJ 268, it is our view that, if at all there is a cause of action to institue the action to enforce the sale and purchase agreement against YTF, it would be the bank who would be entitled to do so, and not Kredin. Clause 1 of the deed of assignment makes this clear when together with its rights, title and interest, Kredin also assigned all remedies for enforcing to the bank.

A With respect, in dealing with this issue, I am bound by the view as expressed by the Federal Court in *Nouvau*, which is in turn, followed by the Court of Appeal in *Kredin Sdn Bhd.*

In the net result, after having given careful consideration to the terms of assignment as found in the deeds of assignment before me, I find that they are in the nature of an absolute assignment. That being the case, I am of the firm view that the plaintiffs herein have no locus standi to institute this proceeding against the defendants.

For the above reasons I, therefore, allowed the first and second defendants' application in encl 14 hereof and further ordered that the plaintiffs' claim herein be dismissed pursuant to O 14A r 1(2) and/or O 33 r 5 of the RHC. The costs for this application and for this action are to be awarded to the first and second defendants.

Defendants application allowed.

Reported by Lim Lee Na